No. 17-5716

IN THE

Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONERS

James Whalen
FEDERAL PUBLIC DEFENDER
Joseph Herrold
ASSISTANT FEDERAL PUBLIC DEFENDER
Capital Square
Suite 340
400 Locust Street
Des Moines, IA 50309

Jeffrey L. Fisher
Counsel of Record
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

18 U.S.C. § 3582(c)(2) authorizes a district court to reduce the sentence of a defendant who was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Petitioners committed various drug crimes that ordinarily carry mandatory minimum terms of imprisonment. But 18 U.S.C. § 3553(e) empowered the district court to impose shorter sentences here, "in accordance with the guidelines and policy statements," to reflect petitioners' substantial assistance to the authorities. After consulting the Guidelines—most notably, U.S.S.G. § 2D1.1 and § 5G1.1(b)—the district court imposed such shorter sentences.

The question presented is whether a defendant in petitioners' situation is eligible for Section 3582(c)(2) relief when the Guidelines are amended to recommend lower sentences in this situation—or whether, as the Eighth Circuit held, the Sentencing Commission is powerless to enable such relief on the ground that the defendant's original sentence was not "based on" a guidelines recommendation at all, but rather on the statutory mandatory minimum that would have applied if no substantial assistance motion had been granted.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
BRIEF FOR PETITIONERS 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY AND GUIDELINES PROVISIONS 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 15
ARGUMENT 18
I. The text of the Sentencing Reform Act dictates that petitioners are eligible under Section 3582(c)(2) to seek sentence reductions 18
A. Petitioners' original sentences were "based on" sentencing guidelines ranges derived from their offense levels under U.S.S.G. § 2D1.1 and their criminal history categories 20
B. Even if the Eighth Circuit were correct that petitioners' sentences were not based on ranges corresponding to their offense levels and criminal histories because of the influence of U.S.S.G. § 5G1.1, petitioners are still eligible for relief 25
II. The structure and objectives of the Sentencing Reform Act support enabling petitioners to seek sentence reductions 35

A. The Sentencing Commission has broad authority to determine who may benefit from retroactive amendments to the Guidelines 35

B. Allowing petitioners to seek sentence reductions is necessary to avoid unjustifiable sentencing disparities 38

CONCLUSION 43

TABLE OF AUTHORITIES

Page(s)

Cases

Alleyne v. United States,
570 U.S. 99 (2013) 30

Bell v. United States,
349 U.S. 81 (1955) 42

Bifulco v. United States,
447 U.S. 381 (1980) 42

Braxton v. United States,
500 U.S. 344 (1991) 36, 38

Busic v. United States,
446 U.S. 398 (1980) 42

Dillon v. United States,
560 U.S. 817 (2010) 24, 35, 36

Dorsey v. United States,
567 U.S. 260 (2012) ..... *passim*

Freeman v. United States,
564 U.S. 522 (2011) ..... *passim*

Gall v. United States,
552 U.S. 38 (2007) 3, 21

Kimbrough v. United States,
552 U.S. 85 (2007) 39

Melendez v. United States,
518 U.S. 120 (1996) 30

Michigan v. E.P.A.,
135 S. Ct. 2699 (2015) 36

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) 38

Mohawk Indus. v. Carpenter,
558 U.S. 100 (2009) 38

Peugh v. United States,
569 U.S. 530 (2013) 21, 22

Rita v. United States,
551 U.S. 338 (2007) 21

In re Sealed Case,
722 F.3d 361 (D.C. Cir. 2013) 28

Simpson v. United States,
435 U.S. 6 (1978) 42

Swint v. Chambers Cty. Comm'n,
514 U.S. 35 (1995) 38

United States v. Becton,
593 Fed. Appx. 469 (6th Cir. 2014) 31

United States v. Billue,
576 F.3d 898 (8th Cir. 2009) ..... *passim*

United States v. Bogdan,
835 F.3d 805 (8th Cir. 2016) 13

United States v. Booker,
543 U.S. 220 (2005) 30

United States v. Byers,
561 F.3d 825 (8th Cir. 2009) 26

United States v. C.D.,
848 F.3d 1286 (10th Cir. 2017) 18

United States v. Freeman,
586 Fed. Appx. 237 (7th Cir. 2014) 40, 41

United States v. Granderson,
511 U.S. 39 (1994) 42

United States v. Rodriguez-Soriano,
855 F.3d 1040 (9th Cir. 2017) 18

United States v. Williams,
808 F.3d 253 (4th Cir. 2015) 13, 18, 40

United States v. Wills,
35 F.3d 1192 (7th Cir. 1994) 30

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 42

United States v. Winebarger,
664 F.3d 388 (3d Cir. 2011) 33, 34

United States v. Wren,
706 F.3d 861 (7th Cir. 2013) 42

Wade v. United States,
504 U.S. 181 (1992) 20, 26

Constitutional Provision

U.S. Const., amend. VI 30

Statutes

18 U.S.C. § 922(g)(1) 5
18 U.S.C. § 924(a)(2) 5
18 U.S.C. § 3553 2
18 U.S.C. § 3553(a)(4) 20
18 U.S.C. § 3553(a)(6) 39
18 U.S.C. § 3553(e) ..... *passim*
18 U.S.C. § 3553(f) 27
18 U.S.C. § 3582(a) 21
18 U.S.C. § 3582(c) 1, 10, 35, 37
18 U.S.C. § 3582(c)(2) ..... *passim*
21 U.S.C. § 841(a)(1) ..... *passim*
21 U.S.C. § 841(b)(1)(A) ..... *passim*
21 U.S.C. § 841(b)(1)(B) 6
21 U.S.C. § 841(c)(1) 7
21 U.S.C. § 841(c)(2) 7

21 U.S.C. § 846 ..... *passim*
21 U.S.C. § 851 ..... 4, 7
28 U.S.C. § 991(b)(1)(B) 39
28 U.S.C. § 994 ..... 2, 20, 28
28 U.S.C. § 994(a) 34
28 U.S.C. § 994(a)(2)(B) 35
28 U.S.C. § 994(a)(2)(C) 36
28 U.S.C. § 994(b) 21, 34
28 U.S.C. § 994(c) 34
28 U.S.C. § 994(n) 16, 27, 31, 32, 34
28 U.S.C. § 994(*o*) 1
28 U.S.C. § 994(u) 36
28 U.S.C. § 1254(1) 1
Federal Sentencing Guidelines Manual
U.S.S.G. app. C, amend. 570 29
U.S.S.G. app. C, amend. 780 ..... 11, 37, 38, 42
U.S.S.G. app. C, amend. 782 ..... *passim*
U.S.S.G. app. C, amend. 788 ..... 10, 11
U.S.S.G. § 1B1.1 3
U.S.S.G. § 1B1.1(a) 21
U.S.S.G. § 1B1.1(a)(1) 21
U.S.S.G. § 1B1.1(a)(2) 21
U.S.S.G. § 1B1.1(a)(3) 21
U.S.S.G. § 1B1.1(a)(4) 21
U.S.S.G. § 1B1.1(a)(5) 21
U.S.S.G. § 1B1.1(a)(6) 21
U.S.S.G. § 1B1.1(a)(7) 21
U.S.S.G. § 1B1.1(a)(8) 21

U.S.S.G. § 1B1.10 11
U.S.S.G. § 1B1.10(a) 10
U.S.S.G. § 1B1.10(b)(1) 24
U.S.S.G. § 1B1.10(c) ..... *passim*
U.S.S.G. § 1B1.10(d) 10, 11, 27, 36, 37
U.S.S.G. § 1B1.10(e) 10
U.S.S.G. § 2D1.1 ..... *passim*
U.S.S.G. § 5G1.1 ..... *passim*
U.S.S.G. § 5G1.1(b) ..... *passim*
U.S.S.G. § 5G1.2 ..... 11, 14
U.S.S.G. § 5G1.2(b) 6, 14
U.S.S.G. § 5K1.1 2

Legislative Materials

139 Cong. Rec. 27,842 (1993) (statement of Sen. Hatch) 29
H.R. Rep. No. 103-460 (1994) 28
Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R. Doc. 99-266 29

Other Authorities

American Heritage Dictionary (4th ed. 2000) 33
Brief for Appellee at 11, *United States v. Becton*, 593 Fed. Appx. 469 (6th Cir. 2014) (No. 12-5851), 2014 WL 3556222 31
Merriam-Webster Dictionary (2004) 33
Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 13, 2014) 23

U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014 (Mar. 6, 2014) 16, 23

U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) 28

BRIEF FOR PETITIONERS

Petitioners Timothy D. Koons et al. respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit (J.A. 44) is published at 850 F.3d 973. The opinion of the district court in Feauto's case (J.A. 57) is published at 146 F. Supp. 3d 1022. The order of the district court in the other petitioners' cases (J.A. 96) is unpublished.

JURISDICTION

The Eighth Circuit entered its judgment on March 10, 2017. J.A. 45. The Eighth Circuit denied a timely petition for rehearing on May 25, 2017. *Id.* 98-100. The petition for a writ of certiorari was filed on August 22, 2017 and granted on December 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

18 U.S.C. § 3582(c) provides: "The court may not modify a term of imprisonment once it has been imposed except that— . . . (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with

applicable policy statements issued by the Sentencing Commission."

The other relevant statutory provisions—namely, 18 U.S.C. § 3553 and 28 U.S.C. § 994—are set forth in the Joint Appendix at pages 221-41.

The relevant provisions of the Federal Sentencing Guidelines Manual are set forth in the Joint Appendix at pages 242-95.

STATEMENT OF THE CASE

This is a consolidated appeal brought by five defendants (collectively, "petitioners") who were convicted between 2008 and 2014 of federal drug crimes. In each case, the district court imposed a sentence that was below an otherwise applicable statutory minimum after granting a "substantial assistance" departure under 18 U.S.C. § 3553(e). In so doing, the judge used the United States Sentencing Guidelines to calculate not just how to account for petitioners' cooperation with authorities, *see* U.S.S.G. § 5K1.1, but also how to measure and account for the seriousness of petitioners' offenses.

The Sentencing Commission subsequently amended the Guidelines to lower the offense levels in drug cases such as these. The Commission also made this amendment retroactive. Finally, it made clear that the amended guidelines range for cooperators such as petitioners should be calculated without regard to the mandatory minimums that the Government's substantial assistance motion rendered inapplicable.

Petitioners now seek sentence reductions pursuant to 18 U.S.C. § 3582(c)(2). That statute empowers district courts to reduce a defendant's

sentence when his original sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *Id.* Although the Government agreed below that the district court had the statutory authority to grant petitioners' requests, the court held to the contrary. The Eighth Circuit affirmed.

1. Each of the five petitioners was convicted of a federal drug crime (or crimes) and originally sentenced as follows:

a. In 2010, petitioner Timothy Koons pleaded guilty to two charges: (1) conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; and (2) possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Koons Plea Agreement ¶ 1.[1] As in all federal criminal cases, the Sentencing Guidelines provided an "advisory" sentence. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 46 (2007). In particular, the Guidelines supplied a "guideline range" that "corresponds to the offense level and criminal history category," along with any required adjustments or otherwise relevant considerations. *See* U.S.S.G. § 1B1.1.

Accordingly, Koons' plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." Koons

[1] The plea agreements cited here and later in this brief are under seal. Petitioners have filed a motion to file them under seal in this Court in the Supplemental Joint Appendix.

Plea Agreement ¶ 15. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Counts 1 and 2, pursuant to USSG § 2D1.1, the appropriate base offense level is at least 34 based upon defendant's involvement with at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine which contained at least 150 grams of actual (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶ 17. After receiving the presentence report and making further calculations and adjustments, the district court determined that Koons' offense level was 31 and that his criminal history category was IV. J.A. 114-15. These factors yielded a guidelines range of 151 to 188 months. *Id.*

Koons' offense conduct and prior record also subjected him to a statutory minimum sentence of 240 months in prison. J.A. 115; *see* 21 U.S.C. § 841(b)(1)(A); *id.* § 851. Under Eighth Circuit law, that meant that U.S.S.G. § 5G1.1 applied in his case. *See United States v. Billue*, 576 F.3d 898, 904-05 (8th Cir. 2009). U.S.S.G. § 5G1.1 provides that "[w]here a statutorily required minimum sentence is greater than the maximum applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b). Applying this guideline, the district court adjusted Koons' guidelines calculation to 240 months. J.A. 115.

The statutory mandatory minimum itself, however, was "waived" here, U.S.S.G. § 2D1.1 cmt. n.24, because Koons had provided substantial assistance to the Government. Under 18 U.S.C. § 3553(e), courts, upon motion of the Government, may "impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance."

Taking U.S.S.G. § 5G1.1(b)'s guidelines sentence of 240 months as its anchor, the district court found that a sentence 25% below the statutory minimum was appropriate in Koons' case. J.A. 116. It therefore sentenced him to 180 months in prison, to be followed by 10 years of supervised release. *Id.* 116, 118.

b. In 2013, petitioner Randy Feauto pleaded guilty to two charges: (1) conspiracy to manufacture methamphetamine and to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; and (2) unlawful possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Feauto Plea Agreement ¶ 1. Feauto's plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." *Id.* ¶ 16. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Count 1, pursuant to USSG § 2D1.1, the appropriate base offense level is at least 32 based upon defendant's involvement with at least 50 grams of actual

> (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶ 18.

After receiving the presentence report and making further calculations and adjustments, the district court determined that Feauto's criminal offense level was 33 and that his criminal history category was III. J.A. 58 n.1, 148. Those factors yielded a guidelines range of 168 to 210 months in prison. *Id.* The district court then adjusted his guidelines sentence under U.S.S.G. § 5G1.2(b) to 240 months, to reflect a mandatory minimum corresponding to his offense conduct and prior record. *Id.* 58 n.1, 148.

In light of Feauto's substantial assistance and the Government's motion under Section 3553(e), the mandatory minimum did not apply. Accordingly, the district court then departed downward, finding that a 45% reduction from the otherwise applicable statutory minimum was appropriate. J.A. 58 n.1, 153. The court sentenced Feauto to 132 months in prison, to be followed by 10 years of supervised release. *Id.* 154.

c. In 2014, petitioner Jose Manuel Gardea pleaded guilty to a single count of conspiracy to distribute 5 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. Gardea Plea Agreement ¶ 1. Gardea's plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." *Id.* ¶ 15. The agreement further stipulated, among other things, that "the

United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Count 1, pursuant to USSG § 2D1.1, the appropriate base offense level is at least 26 based upon defendant's involvement with at least 5 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶17.

After receiving the presentence report and making further calculations and adjustments, the district court determined that his criminal offense level was 23 and that his criminal history category was IV. J.A. 197. Those factors yielded a guidelines range of 70 to 87 months in prison. *Id.* The district court then adjusted his guidelines sentence under U.S.S.G. § 5G1.1 to 120 months, to reflect a mandatory minimum corresponding to his offense conduct and prior record. *Id.*

In light of the Government's motion under Section 3553(e) for a downward departure to reflect Gardea's substantial assistance, the statutory minimum did not apply. Accordingly, the district court departed downward, finding that a 30% reduction from the inapplicable statutory minimum was appropriate. J.A. 198. It sentenced Gardea to 84 months in prison, to be followed by 8 years of supervised release. *Id.* 198-99.

d. In 2008, petitioner Kenneth Jay Putensen pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(c)(1)-(2), 846, and 851. Putensen Plea Agreement ¶ 1. Putensen's plea

agreement provided that "the district court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* ¶ 12. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied as follows":

> **Drug Base Offense Level (Chapter 2)**: For *Count 1*, the parties stipulate and agree that pursuant to USSG § 2D1.1, the appropriate base offense level is at least 34 based upon the defendant's involvement in at least 150 grams of actual (pure) methamphetamine.

Id. ¶ 14.

After receiving the presentence report and making further calculations and adjustments, the district court determined that his criminal offense level was 34 and that his criminal history category was III. J.A. 158. Those factors yielded a guidelines range of 188 to 235 months in prison. Putensen PSR ¶ 83. The district court then adjusted his guideline sentence under U.S.S.G. § 5G1.1 to life in prison, to reflect a mandatory minimum corresponding to his offense conduct and prior record. J.A. 158.

The Government moved under Section 3553(e) for a downward departure due to Putensen's substantial assistance, so the statutory minimum did not apply. Accordingly, the district court departed downward from a life term (which it translated under the Guidelines to 406 months), finding that a 35% reduction from the inapplicable statutory minimum was appropriate. J.A. 167-68, 177. The court sentenced Putensen to 264 months in prison, to be

followed by 10 years of supervised release. *Id.* 177-78. The district court deemed this sentence "higher" than necessary to effectuate the purposes of sentencing. *Id.* But it believed it was precluded at the time from imposing anything lower. *Id.* 176-77.

In early 2017, while this matter has been pending on appeal, Putensen's sentence was commuted to 188 months in prison.

e. In 2014, petitioner Esequiel Gutierrez pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Gutierrez Plea Agreement ¶ 1. Gutierrez's plea agreement provided that "the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant." *Id.* ¶ 16. The agreement further stipulated, among other things, that "the United States Sentencing Guidelines should be applied, at least, as follows":

> **Base Offense Level – Drug Trafficking (Chapter 2):** For Count 1, pursuant to USSG § 2D1.1, the appropriate base offense level is **at least 32** based upon defendant's involvement with at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine, which contained 50 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

Id. ¶ 18.

After receiving the presentence report and making further calculations and adjustments, the

district court determined that his criminal offense level was 31, and his criminal history category was IV. J.A. 216. Those factors yielded a guidelines range of 188 to 235 months in prison. *Id.* The district court then adjusted his guidelines sentence anchor under U.S.S.G. § 5G1.1 to 240 months, to reflect a mandatory minimum corresponding to his offense conduct and prior record. J.A. 216. The district court next decided that an "upward variance" to 300 months was appropriate because the judge believed "[t]he advisory guidelines range d[id] not take into account" certain aspects of Gutierrez's criminal conduct. *Id.*

As in the other cases, the Government filed a substantial assistance motion under Section 3553(e), so the statutory minimum did not apply to Gutierrez. The district court thus "depart[ed] downward from 300 months down to 192 months" (a 36% reduction) in prison, to be followed by 10 years of supervised release. J.A. 218.

2. On November 1, 2014, Amendment 782 to the Guidelines became effective. U.S.S.G. app. C, amend. 782 (Supp. 2016). This provision amended U.S.S.G. § 2D1.1, which established the offense levels for petitioners' drug crimes. Specifically, Amendment 782 "reduce[d] by two levels the offense levels assigned to the [drug] quantities that trigger the statutory mandatory minimum penalties." *Id.* app. C., amend. 782, reason for amend.

The Sentencing Commission also made Amendment 782 retroactive. *See* U.S.S.G. app. C, amend. 788 (Supp. 2016). This allowed eligible defendants who were sentenced before the Amendment's effective date to seek sentence reductions under 18 U.S.C. § 3582(c). *See* U.S.S.G.

§ 1B1.10(a), (d), (e).[2] Finally, part of what this brief will call Amendment 782's "retroactivity package" applied the sentence recalculation methodology in Amendment 780 to cooperators like petitioners. *See* U.S.S.G. § 1B1.10(d), ***as amended by*** U.S.S.G. app. C, amend. 788 (Supp. 2016). Enacted simultaneously with Amendment 782, Amendment 780 inserted the following explanation in U.S.S.G. § 1B1.10 (the policy statement governing reductions of terms of imprisonment as a result of amended guidelines ranges):

> (c) ***Cases Involving Mandatory Minimum Sentences and Substantial Assistance.***—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined ***without regard to the operation of § 5G1.1*** (Sentencing on a Single Count of Conviction) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

U.S.S.G. § 1B1.10(c) (emphasis added). Under this methodology, petitioners' amended guidelines ranges are all substantially lower than the Guidelines provided before Amendment 782. J.A. 48-49, 69.

---

[2] The effective date of any such sentence modification orders under Amendment 782 was November 1, 2015 or later. U.S.S.G. app. C, amend. 788 (Supp. 2016).

3. In 2015, the district court issued orders directing petitioners and the Government to address whether petitioners should receive sentence reductions pursuant to Section 3582(c)(2). J.A. 61 n.3. Petitioners contended they were eligible under the statute and Amendment 782 for reductions and requested lower sentences. *Id.* 57-59. The Government agreed that petitioners were eligible for reductions, as did the Federal Defender for the Northern and Southern Districts of Iowa, appearing as *amicus curiae*. *Id.*

The district court, however, rejected this unanimous position of the parties and *amicus*. The court recognized that "[t]he parties appear to be correct" that Amendment 782 and its retroactivity package render defendants in petitioners' position eligible for sentence reductions. But the district court held that "the *application* of Amendment 782, as called for in the pertinent policy statements in the Sentencing Guidelines, exceeds the Sentencing Commission's statutory authority and/or violates the nondelegation doctrine." J.A. 70; *see also id.* 71, 93. In particular, the district court reasoned that the Sentencing Commission lacks the statutory authority to instruct that defendants who received sentences below mandatory minimums pursuant to substantial assistance motions obtain sentence modifications according to amended sentencing ranges that are not anchored to the mandatory minimums that their cooperation rendered inapplicable. *Id.* 75-76.

Because its analysis and conclusion were "at odds with those of both the defendant[s] and the Department of Justice," the district court "strongly encourage[d]" petitioners to appeal. J.A. 95, 97.

4. On appeal, the Government again joined petitioners in arguing that they are eligible for sentence reductions pursuant to Section 3582(c)(2). J.A. 50-51. The parties also pointed to the intervening decision in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015), in which the Fourth Circuit held that defendants like petitioners are eligible for relief under Section 3582(c)(2). J.A. 51. But the Eighth Circuit disagreed and affirmed the district court's statutory holding to the contrary.[3] *Id.* 53, 56.

The court of appeals observed that a "threshold" requirement for a sentencing reduction under Section 3582(c)(2) is that a defendant must have been originally sentenced "based on" a guidelines sentencing range. J.A. 51 (emphasis omitted) (first quoting *United States v. Bogdan*, 835 F.3d 805, 807 (8th Cir. 2016); second quoting 18 U.S.C. § 3582(c)(2)); *see also Freeman v. United States*, 564 U.S. 522 (2011). In the court of appeals' view, that requirement is not satisfied here.

The Eighth Circuit acknowledged that the district court—as it was required to do—consulted each petitioner's guidelines range derived from his offense level and criminal history. J.A. 46-47. Under Eighth Circuit law, "[w]hen the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the

---

[3] The court of appeals "d[id] not address" the district court's nondelegation doctrine holding, J.A. 50 n.1, and the Government did not defend it in its brief in opposition. The issue is therefore not before this Court.

mandatory minimum sentence, the court must use the mandatory minimum as the starting point." J.A. 52 (citing *Billue*, 576 F.3d at 904-05). The Eighth Circuit has derived this rule, too, from a guideline—specifically, U.S.S.G. § 5G1.1(b). *See Billue*, 576 F.3d at 904-05. That provision instructs that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b).[4]

The Eighth Circuit nevertheless held here that the district court's consultation of each petitioner's guidelines range derived from his offense level and criminal history did not make petitioners' sentences "based on" guidelines recommendations. *See* J.A. 52, 56. Nor, according to the Eighth Circuit, did the influence of U.S.S.G. § 5G1.1 under circuit law render petitioners' sentence "based on" guidelines recommendations. *Id.* 55. The Eighth Circuit reasoned that the Sentencing Commission in this situation lacks the statutory authority to establish guidelines sentences below otherwise applicable mandatory minimums. *Id.* Accordingly, the Eighth Circuit deemed it unduly "artificial," or "fictional," to say petitioners' original sentences were based on any guidelines ranges, as opposed to the statutory mandatory minimums that were inapplicable because

---

[4] A second subsection of Chapter 5, Part G technically applies when the defendant has been convicted of multiple counts, as Koons and Feauto were. *See* U.S.S.G. § 5G1.2(b). But as relevant to this case, that subsection operates the same way as U.S.S.G. § 5G1.1(b). *See Id.* § 5G1.2 cmt. n.3. For simplicity, therefore, petitioners refer in the remainder of this brief solely to U.S.S.G. § 5G1.1(b).

the district court granted substantial assistance motions. *Id.*

5. The Eighth Circuit denied rehearing, J.A. 98-100, and this Court granted certiorari, 138 S. Ct. ___ (2017).

SUMMARY OF ARGUMENT

A defendant who, after providing substantial assistance to authorities, received a sentence below an otherwise applicable mandatory minimum pursuant to 18 U.S.C. § 3553(e) is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) where, as here, the Sentencing Commission has retroactively lowered the defendant's advisory guidelines range.

I. A defendant is eligible under Section 3582(c)(2) for a sentence reduction if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). A defendant's original sentence was "based on" a guidelines range if the district court necessarily consulted that range in crafting the defendant's sentence.

Such is the case here. For each petitioner, the district court calculated a guidelines range according to his offense level under U.S.S.G. § 2D1.1 and criminal history category—a range the Sentencing Commission has since retroactively lowered by amending U.S.S.G. § 2D1.1. Indeed, the court had to calculate these original ranges: "The correct application of sentencing law requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated § 2D1.1 range when determining the appropriate sentence."

U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 4 (Mar. 6, 2014).[6] That U.S.S.G. § 2D1.1 range necessarily forms a foundation for each sentence the judge ultimately imposes.

Even if the Eighth Circuit were correct that petitioners' original sentences were not "based on" their U.S.S.G. § 2D1.1 ranges because U.S.S.G. § 5G1.1 required the district court to adjust the Guidelines' recommended sentences upward to the statutory minimums that would have applied absent their substantial assistance, petitioners are still eligible for relief. To repeat: a substantial assistance motion under Section 3553(e) renders an otherwise binding statutory minimum inapplicable. And 28 U.S.C. § 994(n) explicitly empowers the Sentencing Commission in this situation to recommend imposing a sentence "that is lower than established by statute as a minimum sentence." So even if U.S.S.G. § 5G1.1 required petitioners' original guidelines sentences to be pegged to statutory minimums (and then reduced from those levels), that directive was a function of *the Guidelines*, not the statutory minimums themselves. And the Sentencing Commission has now changed the Guidelines in this respect: In conjunction with enacting Amendment 782 and making it retroactive, the Commission made clear that defendants' amended guidelines ranges should be calculated

---

[6] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

"without regard to the operation of § 5G1.1." U.S.S.G. § 1B1.10(c). That being so, no matter how one approaches this case, petitioners' sentences were based on guidelines ranges that have subsequently been lowered.

II. The structure and objectives of the Sentencing Reform Act reinforce petitioners' eligibility for sentence reductions under Section 3582(c)(2). Several provisions in the Act assign the Sentencing Commission primary responsibility for determining whether, and under what circumstances, defendants are eligible for such reductions. After collecting written testimony, holding public hearings, and being assured by the Department of Justice it was a wise and proper thing to do, the Commission exercised that authority in Amendment 782 and its accompanying retroactivity package. The Commission's determinations warrant the judiciary's full respect.

Deeming petitioners eligible for sentence reductions under Section 3582(c)(2) is also essential to avoid new and unwarranted sentencing disparities. No one disputes that defendants who received sentences for drug crimes below otherwise applicable statutory minimums because of their substantial assistance—but whose guidelines ranges based on their offense levels and criminal history categories were *above* those statutory minimums—are eligible under Amendment 782 for sentence reductions. In light of this fact, it would be perverse to exclude defendants such as petitioners—who are identically situated except for having had guidelines ranges based on their offense levels and criminal history categories that were *below* inapplicable statutory minimums—from the ambit of Section

3582(c)(2). If anything, such defendants are more deserving of lower sentences.

ARGUMENT

For several years, the Government maintained that the Sentencing Commission acted within its statutory powers in providing that defendants in petitioners' situation "are eligible for sentence reductions under 18 U.S.C. § 3582(c)(2)." U.S. C.A. Koons Br. 6.[6] The Government's previous position, which it abandoned for the first time in its brief in opposition in this case, is correct.

I. The text of the Sentencing Reform Act dictates that petitioners are eligible under Section 3582(c)(2) to seek sentence reductions.

A federal prisoner is eligible under Section 3582(c)(2) for a sentence reduction if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

In *Freeman v. United States*, 564 U.S. 522 (2011), this Court considered "whether defendants who enter into [Fed. R. Crim. P.] 11(c)(1)(C) [plea] agreements that specify a particular sentence may be said to have been sentenced 'based on' a Guidelines sentencing range, making them eligible for relief

---

[6] For other cases in which the Government took this position, see *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015); *United States v. Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017), *petition for cert. filed*, No. 17-6292 (Oct. 6, 2017); and *United States v. C.D.*, 848 F.3d 1286 (10th Cir. 2017), *petition for cert. filed*, No. 16-9672 (June 20, 2017).

under § 3582(c)(2)." 564 U.S. at 527 (plurality opinion). No majority coalesced around a single, precise definition of the statutory phrase "based on" in the Rule 11(c)(1)(C) context. But all Justices agreed that a sentence was "based on" a guidelines range when the judge needed to consult the Guidelines to determine the defendant's sentence. *See id.* at 530 (plurality opinion) (sentence is "based on" the guidelines "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence"); *see also id.* at 535 (Sotomayor, J., concurring in the judgment) ("To ask whether a particular term of imprisonment is 'based upon' a Guidelines sentencing range is to ask whether that range serves as the basis or foundation for the term of imprisonment."); *id.* at 545 (Roberts, C.J., dissenting) (suggesting that a sentence would be "based on" a guidelines calculation if the judge "needed to consult" that calculation).

This "needed to consult" touchstone is sufficient to resolve this case. The district court needed to (and did) consult petitioners' sentencing ranges corresponding to their offense levels under U.S.S.G. § 2D1.1 and criminal history categories in crafting their sentences. And even if the Eighth Circuit was correct in focusing instead on guidelines sentences that resulted from also applying U.S.S.G. § 5G1.1 to adjust petitioners' recommended sentences to the mandatory minimums that would have applied absent their substantial assistance, those adjusted calculations driven by Section 5G1.1 were also sentencing ranges the sentencing court needed to (and did) consult in crafting petitioners' sentences.

A. Petitioners' original sentences were "based on" sentencing guidelines ranges derived from their offense levels under U.S.S.G. § 2D1.1 and criminal history categories.

When the Government asked the district court to give petitioners shorter sentences than otherwise applicable mandatory minimums so as to reflect their substantial assistance to authorities, the plain language of 18 U.S.C. § 3553(e) required the sentencing judges to consult the guidelines ranges derived from petitioners' offense levels under U.S.S.G. § 2D1.1 and their criminal histories to determine their sentences. By amending Guideline 2D1.1 in Amendment 782, the Sentencing Commission has now lowered those ranges.

1. Section 3553(e) "empowers district courts, '[u]pon motion of the Government,' to impose a sentence below the statutory minimum to reflect a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.'" *Wade v. United States*, 504 U.S. 181, 182 (1992) (quoting 18 U.S.C. § 3553(e)). The statute further provides, in terms critical to the case at hand: "Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." 18 U.S.C. § 3553(e). Accordingly, Congress has directed sentencing courts in the precise situation at issue to impose sentences "in accordance with the guidelines." *Id.*; *see also id.* § 3553(a)(4) ("The court, in determining the particular sentence to be imposed, shall consider—. . . the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in

the guidelines."); *id.* § 3582(a) (The court "shall consider the factors set forth in section 3553(a) to the extent they are applicable . . . .").

2. The Guidelines themselves—and the methodology the district court followed in imposing the sentences at issue here—confirm that petitioners' sentences were based on guidelines ranges derived from their offense levels under U.S.S.G. § 2D1.1 and criminal history categories.

The Guidelines set forth an eight-step procedure for calculating the "guideline range" that applies in any given case. U.S.S.G. § 1B1.1(a); *see also* 28 U.S.C. § 994(b). The first seven steps involve determining the defendant's offense level and criminal history category. *See* U.S.S.G. § 1B1.1(a)(1)-(7). Those two factors yield "the guideline range in Part A of Chapter Five that corresponds to the [defendant's] offense level and criminal history category." *Id.* § 1B1.1(a)(7). The eighth step requires the court to determine whether any other sentencing requirement constricts or alters the "particular guideline range." *Id.* § 1B1.1(a)(8).

Through this procedure, "[t]he Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion." *Freeman*, 564 U.S. at 529 (plurality opinion). Therefore, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007) (citing *Rita v. United States*, 551 U.S. 338, 347-48 (2007)). That is, a sentencing judge is always "required to consult the Guidelines." *Peugh v. United States*, 569 U.S. 530, 536 (2013). "Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses

the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.'" *Id.* at 542 (emphasis omitted) (quoting *Freeman*, 564 U.S. at 529 (plurality opinion)).

The parties and the district court followed this procedure in all of the cases here. In each petitioner's plea agreement, the parties acknowledged that "the United States Sentencing Guidelines should be applied" in these cases. *E.g.*, Koons Plea Agreement ¶ 17.[7] The parties further stipulated, among other things, that each petitioner's base offense level should be computed according to the levels assigned to drug quantities in U.S.S.G. § 2D1.1. *E.g.*, *id.*

For each petitioner, the district court then calculated and considered the guidelines range that flowed from each petitioner's offense level under U.S.S.G. § 2D1.1 and criminal history category. *See supra* at 4-10. Eighth Circuit precedent then required the district court to make an adjustment under step eight, to account for the statutory minimum sentences that would have applied but for petitioners' substantial assistance. *See United States v. Billue*, 576 F.3d 898, 904-05 (8th Cir. 2009). But whatever the correctness and import of that action (*see infra* Part I.B), it does not change the fact that the district judge calculated and consulted the guidelines ranges that corresponded to each petitioner's offense level under U.S.S.G. § 2D1.1 and used those ranges as "the beginning point" of its sentencing process. *Peugh*, 569 U.S. at 542 (quoting *Freeman*, 564 U.S. at 529

---

[7] Each petitioner's plea agreement is identical insofar as discussed in this paragraph. *See supra* at 3-9.

(plurality opinion)); *see also supra* at 3-10 (describing petitioners' sentencing proceedings). And the court was required to do so: "The correct application of sentencing law requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated § 2D1.1 range when determining the appropriate sentence." U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 4 (Mar. 6, 2014).[8]

Indeed, for three of the five petitioners, the U.S.S.G. § 2D1.1 guidelines ranges turned out to be not just the starting points for their sentencings but the endpoints as well: The sentences for Koons, Gardea, and Gutierrez fell within those guidelines ranges. *See supra* at 4, 7, 10. (Putensen's original sentence was above his range, though it was later commuted to within his range, and Feauto's was below. *See supra* at 6, 8-9.) This convergence is not surprising. When a judge selects a sentence under Section 3553(e), the judge "probably at least has in his or her mind" what the defendant's guidelines range is "absent the mandatory minimum." *Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines* 255 (Mar. 13, 2014) (statement of Robert Zauzmer, on behalf of U.S. Dep't of Justice). In other words, there can be no denying the magnetic pull in this setting of the applicable U.S.S.G. § 2D1.1 ranges.

---

[8] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

Petitioner Gutierrez's sentencing hearing provides a particularly vivid example of this effect. After finding that Gutierrez's guidelines range based on his offense level and criminal history category was 188 to 235 months, the district court noted that he was also subject to a 240-month mandatory minimum. J.A. 216. But in conjunction with granting the government's substantial assistance motion, the judge returned to the Guidelines to determine Gutierrez's sentence. The judge selected 300 months as an anchor for his substantial assistance departure because the "advisory guidelines range d[id] not take into account" the full range of Gutierrez's conduct. *Id.* The judge then departed downward to 192 months—a sentence within Gutierrez's original range. *Id.* 218.

3. Finally, there can be no doubt that the Sentencing Commission "subsequently . . . lowered" the guidelines ranges that applied to petitioners, as required by 18 U.S.C. § 3582(c)(2). A defendant's guidelines range has been lowered when the guidelines calculation from the initial sentencing is higher than "'the amended guideline range that would have been applicable to the defendant' had the relevant amendment been in effect at the time of the initial sentencing." *Dillon v. United States*, 560 U.S. 817, 827 (2010) (quoting U.S.S.G. § 1B1.10(b)(1)).

That test is satisfied here. The district court at petitioners' original sentencings applied then-prevailing offense levels in U.S.S.G. § 2D1.1 that corresponded to the drug quantities involved in petitioners' crimes. Amendment 782 reduced all of those offense levels by two levels. U.S.S.G. app. C, amend. 782, reason for amend. (Supp. 2016). That being so, petitioners are eligible for sentence modifications under Section 3582(c)(2).

B. Even if the Eighth Circuit were correct that petitioners' sentences were not based on ranges corresponding to their offense levels and criminal histories because of the influence of U.S.S.G. § 5G1.1, petitioners are still eligible for relief.

The Eighth Circuit acknowledged that the district court considered each petitioner's "guidelines range," meaning the ranges that flowed from each petitioner's offense level under U.S.S.G. § 2D1.1 and his criminal history. *See* J.A. 46-48. But the court of appeals refused to treat petitioners' sentences for purposes of Section 3582(c)(2) as "based on" those guidelines ranges. J.A. 52. This is because when petitioners were sentenced, Eighth Circuit law held that U.S.S.G. § 5G1.1 applied in substantial assistance cases such as petitioners'. J.A. (citing *Billue*, 576 F.3d at 904-05). And the district court here indeed adjusted petitioners' "guidelines sentence[s]" under U.S.S.G. § 5G1.1(b) before departing downward to account for their substantial assistance. J.A. 46; *see also id.* 48-49.

Guideline 5G1.1 sets forth rules for adjusting guidelines ranges when necessary to account for statutory mandatory minimums. Subsection (b)—the subsection Eighth Circuit law deemed applicable here—provides: "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b). Consequently, the Eighth Circuit believed that "[t]he ultimate 'guidelines range'" for petitioners was "the statutory mandatory minimum" that would have applied if they had not given substantial assistance. *Billue*, 576

F.3d at 904 (quoting *United States v. Byers*, 561 F.3d 825, 826-27 (8th Cir. 2009)).

This appears to be an improper interpretation of the Guidelines. Guideline 5G1.1(b) applies only where there is "a statutorily *required* minimum sentence." U.S.S.G. § 5G1.1(b) (emphasis added). And the whole point of substantial assistance motions under Section 3553(e) is that they allow an offender to "escape" an otherwise binding statutory minimum. *Dorsey v. United States*, 567 U.S. 260, 285 (2012); *see also Wade v. United States*, 504 U.S. 181, 182 (1992) (substantial assistance motions "empower[] district courts . . . to impose a sentence *below* the statutory minimum" (emphasis added)). In other words, where a court grants a substantial assistance motion, there is no statutory minimum sentence that is "required."

But even assuming the Eighth Circuit is correct that when petitioners were originally sentenced, U.S.S.G. § 5G1.1(b) instructed district courts to tether sentences in these circumstances to the mandatory minimum that would have applied absent the substantial assistance motion, it does not matter. Part of Amendment 782's retroactivity package provides that if the case "involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities," then the defendant's amended guidelines range "shall be determined *without regard to the operation of § 5G1.1.*" U.S.S.G. § 1B1.10(c) (emphasis added); *see also* U.S.S.G. § 1B1.10(d) (applying this provision to Amendment 782). Applying this methodology here results in all petitioners having lower sentencing

ranges than the district court used at their original sentencings—just as Section 3582(c)(2) requires.

The Eighth Circuit, in fact, "accept[ed]" that, even under its view of the Guidelines, the Commission has lowered petitioners' guidelines ranges. *See* J.A. 50 n.1. But the court of appeals still held that petitioners are not eligible for relief under Section 3582(c)(2). This is so, the Eighth Circuit reasoned, because each petitioner's *original* "guidelines range" set according to U.S.S.G. § 5G1.1 necessarily "depended upon the mandatory minimum." J.A. 52. The Commission, according to the Eighth Circuit, had to set cooperators' sentences "at the mandatory minimum before considering a substantial assistance departure." *Id.* Therefore, the court of appeals continued, it would be entirely "artificial," or "fictional," to say that petitioners' original sentences were "based on" the guidelines calculations set according to U.S.S.G. § 5G1.1(b), as opposed to the statutory mandatory minimums themselves. J.A. 55.

This reasoning might be correct in the mine-run of cases, when defendants have not given substantial assistance (or are not otherwise exempt from a mandatory minimum, *see* 18 U.S.C. § 3553(f)). But ***when defendants have given substantial assistance*** that resulted in the government filing a Section 3553(e) motion, the Eighth Circuit's reasoning cannot be squared with 18 U.S.C. § 3553(e) or 28 U.S.C. § 994(n).

1. Recall that Section 3553(e)—a federal statute, just like the otherwise binding mandatory minimum—gives district courts "the authority to impose a sentence *below* a level established by statute as a minimum sentence so as to reflect a

defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (emphasis added). Critically, the statute adds: "Such sentence shall be imposed *in accordance with the guidelines and policy statements* issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." *Id.* (emphasis added). The plain language of Section 3553(e) therefore instructs that upon granting substantial assistance motions, courts must consult the Guidelines to impose sentences "below a level established by statute as a minimum sentence."

Numerous other sources confirm this analysis. For starters, this Court has explained that once trial courts grant substantial assistance motions, defendants "are relieved of application of a mandatory minimum." *Dorsey*, 567 U.S. at 285. Or, as the D.C. Circuit has put it, "granting [a] § 3553(e) motion free[s] the district court to . . . disregard the mandatory minimum." *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013).

Legislative history describing Section 3553(e) likewise explains that "a substantial assistance motion granted by the court removes the mandatory minimum requirements that would otherwise be binding at sentencing." U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 59 (1991), *referenced in* H.R Rep. No. 103-460, at 4. A defendant in this situation is "not subject to any mandatory minimum penalties." *Id.*; *see also* Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R. Doc. 99-266, at 117 (Section 3553(e) creates "an

exception" from otherwise applicable "mandatory minimum sentences."); 139 Cong. Rec. 27,842 (1993) (statement of Sen. Hatch) ("When the court grants a substantial-assistance motion, mandatory minimum sentences do not apply.").[9]

The Guidelines themselves also recognize that a substantial assistance motion "waive[s]" an otherwise applicable mandatory minimum. U.S.S.G. § 2D1.1 cmt. n.24; *see also* U.S.S.G. app. C, amend. 570, reason for amend. (Supp. 2016) (A defendant "who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e)[] is not subject to any statutory minimum term of supervised release."). And last, but not least, the Government explained below that when a district court grants a substantial assistance motion, its order "eliminate[s] the requirement that the court apply the mandatory minimum." U.S. C.A. Koons Br. 15.

Once an otherwise binding mandatory minimum does not apply, something must provide the framework for sentencing. That something is the Guidelines. Put another way, Section 3553(e) is "designed to deal with statutory minima that lie above the range of sentences the Sentencing Commission thinks best. In exchange for assistance, the prosecutor can remove the barrier to the use of

---

[9] The form the Judicial Conference has created, and the Sentencing Commission has approved, for federal courts to provide a written "Statement of Reasons" whenever they impose a criminal sentence is in accord. That form provides a box for judges to check when an otherwise applicable mandatory minimum "does not apply" because of the defendant's substantial assistance. *See* AO 245 SOR, Part II.

the guideline range." *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994) (Easterbrook, J., dissenting).[10] Thus, even if the district court here was required to reference (and to depart from) the statutory minimums that were waived by means of petitioners' substantial assistance, the Guidelines provided the methodology for the downward departure. And that means petitioners' sentences were "based on" the guidelines recommendations.

The Government, in fact, recognized the primacy of the Guidelines in this situation before the present controversy even arose. Under *Alleyne v. United States*, 570 U.S. 99 (2013), any fact that triggers a statutory mandatory minimum is an "element" under the Sixth Amendment that must be included in an indictment and proven beyond a reasonable doubt to a jury. *Id.* at 103. This rule, however, does not apply to facts that merely affect advisory guidelines ranges. *See United States v. Booker*, 543 U.S. 220, 233 (2005). The issue arises, therefore, whether *Alleyne* applies in the circumstances under which petitioners were sentenced—that is, where a defendant's criminal conduct subjects him to a statutory mandatory minimum but a substantial assistance motion empowers the district court to disregard it.

As the Government has explained, the answer is no: "[T]he key feature" in such a scenario is that the defendant "ultimately [i]s not subject to any statutory minimum sentence, because the district court granted a substantial assistance motion in his case." Br. for Appellee at 11, *United States v. Becton*, 593

---

[10] This Court vindicated Judge Easterbrook's dissent in *Melendez v. United States*, 518 U.S. 120 (1996).

Fed. Appx. 469 (6th Cir. 2014) (No. 12-5851), 2014 WL 3556222. "No fact operate[s] to increase [the defendant's] statutory penalties, because he [i]s not subject to any minimum penalty once the substantial assistance motion [i]s granted." *Id.* at 11-12. The Sixth Circuit has deemed this explanation so obviously correct that it has adopted it in an unpublished opinion, *see Becton*, 593 Fed. Appx. 469, and petitioners are aware of no court that has held to the contrary.

2. Section 994(n) confirms the Sentencing Commission's power to promulgate guidelines that recommend sentences below otherwise applicable mandatory minimums when district courts grant substantial assistance motions. In that provision, Congress directed the Commission to "assure that the guidelines reflect the general appropriateness of imposing a *lower* sentence than . . . that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." 28 U.S.C. § 994(n) (emphasis added).

This statute reinforces that when district courts grant substantial assistance motions, the Sentencing Reform Act leaves to the Guidelines how to calculate recommended below-minimum sentences. Thus, even assuming, at the time of petitioners' sentencings, the Guidelines required the sentences of cooperators in their situation to be tethered to the mandatory minimums that would have applied absent their substantial assistance, that was a choice the Commission made, not a matter of statutory compulsion. The Sentencing Commission could just as legitimately have pegged petitioners' sentences to 90% of the otherwise applicable statutory minimums or one year less than the statutory minimums—or, as

it has now done expressly under U.S.S.G. § 1B1.10(c), to the sentencing ranges that apply based solely on offense level and criminal history.

3. Perhaps recognizing the Eighth Circuit's error in overlooking Sections 3553(e) and 994(n), the Solicitor General tried in its brief in opposition to shore up the holding below. There, the Solicitor General maintained that Section 3553(e) does not confer as much authority upon the Commission as petitioners claim. According to the Solicitor General, Section 3553(e) "expressly ties" sentences in the situation here to "the sentence 'established by statute as a minimum sentence'" and dictates that departures from those minimums "must be based *exclusively* on assistance-related considerations, not on any other considerations embodied in the Guidelines." BIO 15 (quotation marks and citation omitted).

The Solicitor General's construction of Section 3553(e) turns the provision on its head. The whole point of Section 3553(e) is to allow district courts to "escape" the application of mandatory minimums, *Dorsey*, 567 U.S. at 285, not to chain courts to such statutory sentences. *See supra* at 28-29. Section 3553(e), therefore, expressly authorizes courts "to impose a sentence *below* a level established by statute as a minimum sentence." 18 U.S.C. § 3553(e) (emphasis added).

It makes no difference that Section 3553(e) also says that a sentence below an otherwise applicable mandatory minimum should "reflect a defendant's substantial assistance." 18 U.S.C. § 3553(e). Contrary to the Solicitor General's contention, the word "reflect" does not indicate that a sentence in this situation must be *based on* the inapplicable statutory

minimum—much less that the sentence must be "exclusively" based on factors directly related to substantial assistance without regard to "any other considerations embodied in the Guidelines," BIO 15. The word "reflect" means simply "to make apparent." The Merriam-Webster Dictionary 607 (2004); *see also* American Heritage Dictionary 1467 (4th ed. 2000). Accordingly, a sentence "reflects" a defendant's substantial assistance simply by being lower than it otherwise would be—that is, by making apparent that the defendant's actions have rendered the mandatory minimum inapplicable. There is no reason why such a sentence cannot take into account the seriousness of the defendant's conduct, as quantified in the Guidelines.[11]

Even the decision the Government cites for its preferred construction of Section 3553(e) recognizes that the word "reflect" does not eclipse the relevance of guidelines ranges in substantial assistance cases. That case holds that a district court in the situation here should identify "the outer limit of [a] permissible departure" downward from the statutory minimum according to "the nature and extent of the assistance rendered." *United States v. Winebarger*, 664 F.3d 388, 395 (3d Cir. 2011). But after that, the court may consider "the nature and circumstances of the offense" in determining the precise length of sentence to impose between the outer (downward) limit and

---

[11] Similarly, if a university reduces its tuition price so as to "reflect" a low-income student's limited resources, it need not key the amount of the reduction directly to the degree to which the student is unable to pay the sticker price. It can simply charge the student less money, however exactly the lower price tag might be calculated.

the statutory minimum. *Id.* And the way under the Guidelines to assess the seriousness of the offense is to consult the range resulting from the defendant's offense level and criminal history, as well as any other guidelines sentencing requirements related to the defendant's conduct. *See* 28 U.S.C. § 994(a)-(c). Therefore, even if Section 3553(e) is as restrictive as *Winebarger* says, sentences imposed after granting a motion pursuant to that statute are still necessarily "based on" the Guidelines.

At any rate, the Government's proposed construction of Section 3553(e) still does not account for Section 994(n). That provision directs the Sentencing Commission in appropriate circumstances to recommend imposing "a sentence that is lower than that established by statute as a minimum sentence." 28 U.S.C. § 994(n). And nothing in that statute requires the Commission in the circumstances here to tether such sentences to the very mandatory minimum that a defendant's substantial assistance renders inapplicable. Consequently, even if the Eighth Circuit is right that, when petitioners were originally sentenced, U.S.S.G. § 5G1.1(b) required anchoring their downward departures to their inapplicable mandatory minimums, the calculations influenced by Guideline 5G1.1(b) were a foundation for petitioners' sentences. And that foundation has now been retroactively altered, resulting in lower sentencing ranges for petitioners.

II. The structure and objectives of the Sentencing Reform Act support enabling petitioners to seek sentence reductions.

Two aspects of the Sentencing Reform Act reinforce the conclusion that the Sentencing Commission has the power to make defendants in petitioners' situation eligible for sentence reductions: (A) the Act's conferral of broad authority upon the Commission to determine who may benefit from retroactive amendments to the Guidelines; and (B) the Act's directive to avoid unwarranted sentencing disparities.

A. The Sentencing Commission has broad authority to determine who may benefit from retroactive amendments to the Guidelines.

Section 3582(c)(2) "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon v. United States*, 560 U.S. 817, 828 (2010). And the Sentencing Reform Act, by its terms, gives a "substantial role" to the Sentencing Commission "with respect to sentence-modification proceedings." *Id.* at 826.

For one thing, Section 3582(c)(2) allows sentence reductions only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). To that end, the Sentencing Reform Act empowers the Commission to issue "general policy statements regarding . . . *the appropriate use of* . . . the sentence modification provision[] set forth in" Section 3582(c). 28 U.S.C. § 994(a)(2)(B) (emphasis added). As this Court recently explained, the statutory term "appropriate" provides "agencies with flexibility" to determine how

to implement congressional grants of authority. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015).

Equally important, the Act provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify *in what circumstances* and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u) (emphasis added). This is an "unusual[ly] explicit" grant of power. *Braxton v. United States*, 500 U.S. 344, 348 (1991). It is also unqualified. Courts therefore are bound to follow the Commission's specifications in determining whether a sentence reduction is permissible. *See Dillon*, 560 U.S. at 827; *see also Braxton*, 500 U.S. at 348.

The Sentencing Commission here exercised the precise discretionary authority and expertise that the Sentencing Reform Act envisions. The Commission first determined that the offense levels set in Chapter 2 of the Guidelines were too high and thus reduced them by two levels across the board. *See* U.S.S.G. app. C, amend. 782, reason for amend. (Supp. 2016). The Commission next concluded that this change should be retroactive. *See* U.S.S.G. § 1B1.10(d). It also determined that it would be "appropriate," 28 U.S.C. § 994(a)(2)(C), for prisoners "in [these] circumstances," *id.* § 994(u), to be able to seek sentence reductions. Specifically, the Commission expressly resolved that where, as here, "the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of [the policy statement allowing sentence

reductions when the Commission has lowered the applicable guideline range] the amended guideline range shall be determined without regard to the operation of § 5G1.1." U.S.S.G. § 1B1.10(c); *see also id.* § 1B1.10(d) (applying this methodology to defendants under Amendment 782).

The Sentencing Commission reached this conclusion about eligibility for Section 3582(c) relief after collecting written testimony, holding public hearings, and undertaking careful reflection. In a simultaneously enacted amendment that implements Amendment 782 and other retroactive amendments, the Commission explained that defendants in petitioners' situation should have "the opportunity to receive the full benefit of a reduction that accounts for [their substantial] assistance" to the authorities. U.S.S.G. app. C, amend. 780, reason for amend. (Supp. 2016). The Commission explained:

> The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Id.

All of this reasoning puts the lie to the Eighth Circuit's assertion (J.A. 53) that the Sentencing Commission "ignored th[e] 'based on' statutory requirement" in Section 3582(c)(2). The Commission expressly observed that defendants who gave substantial assistance were eligible for sentences "below" otherwise applicable "statutory minimum[s]." U.S.S.G. app. C, amend. 780, reason for amend. (Supp. 2016). Consequently, they may seek relief as a result of retroactive amendments to guidelines reducing their offense levels, even though defendants "who are otherwise similar (but did not provide substantial assistance)" remain "subject to a . . . statutory minimum." *Id.*

This Court should respect the Commission's determination in this regard. The Commission's "informed assessment[s]"—much like those of the Advisory Committee on the Federal Rules of Civil Procedure when it comes to matters Congress has delegated to it to address—are the "'preferred means'" of determining when prisoners should be eligible for sentence reductions, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017) (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 113 (2009)). *See Braxton*, 500 U.S. at 348. That being so, the Commission's assessment that cooperators such as petitioners should be eligible under Section 3582(c)(2) for sentence reductions "warrants the Judiciary's full respect." *Baker*, 137 S. Ct. at 1714 (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995)).

B. Allowing petitioners to seek sentence reductions is necessary to avoid unjustifiable sentencing disparities.

1. An overarching goal of the Sentencing Reform Act—and a specific directive to the Sentencing

Commission—is to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *accord* 28 U.S.C. § 991(b)(1)(B). This Court, therefore, has warned against construing the Act to "create new anomalies—new sets of disproportionate sentences—not previously present." *Dorsey v. United States*, 567 U.S. 260, 278 (2012).

In *Dorsey*, for example, the Court held that it was necessary to give defendants the benefit of statutory amendments and new guidelines exempting them from previously applicable mandatory minimums because otherwise the amendments would have created "a new disparate sentencing 'cliff.'" 567 U.S. at 279. The difference of a single gram of drugs in two otherwise identical cases would have triggered several years' difference in sentences. *Id.*; *see also Kimbrough v. United States*, 552 U.S. 85, 108 (2007) ("Under [18 U.S.C. § 3553(a)(6)], district courts must take account of . . . the 'cliffs' resulting from the statutory mandatory minimum sentences.").

The Eighth Circuit's decision creates the same prospect for "new anomalies—new sets of disproportionate sentences—not previously present." *Dorsey*, 567 U.S. at 278. As the district court noted, and the Government confirmed in its brief in opposition, Section 3582(c)(2) indisputably allows courts to reduce defendants' sentences pursuant to Amendment 782 "when a defendant's guidelines range [was] *above* the mandatory minimum." BIO 15 n.3; *see also* J.A. 61. Thus, where defendants' "extensive criminal histories or severe offense conduct" caused their guidelines ranges for drug offenses to exceed otherwise applicable mandatory minimums, all agree that Section 3582(c)(2) now

allows them to seek sentence reductions. *United States v. Williams*, 808 F.3d 253, 262 (4th Cir. 2015). Yet under the Eighth Circuit's construction of Section 3582(c)(2), similarly situated defendants convicted of drug crimes and "whose Guidelines ranges are entirely *below* their statutory minimums[] would be denied relief." *Id.* (emphasis added).

This makes no sense. Consider, for example, two defendants who were convicted—as petitioner Gardea was—of drug crimes subjecting them to a 120-month mandatory minimum sentence. Suppose that both received lower sentences under Section 3553(e) in exchange for giving substantial assistance. If defendant A's original U.S.S.G. § 2D1.1 guidelines range was 121 to 151 months, all agree he is eligible for a sentence reduction under Section 3582(c)(2) and Amendment 782. But if defendant B's original U.S.S.G. § 2D1.1 guidelines range was 108 to 135 months—a range that substantially overlaps with defendant A's but dips just below the inapplicable mandatory minimum—the Eighth Circuit's construction of Section 3582(c)(2) would render him ineligible for a sentence reduction. This would create just the sort of "new disparate sentencing 'cliff'" that this Court condemned in *Dorsey*. *See* 567 U.S. at 279.

Worse yet, the Eighth Circuit's rule would often result in many defendants whose crimes were *more serious* than otherwise identically situated counterparts receiving *shorter* sentences. A comparison between a case the Government approvingly cites (*United States v. Freeman*, 586 Fed. Appx. 237 (7th Cir. 2014), *cited in* BIO 15 n.3) and petitioner Koons' case illustrates the point.

Freeman, who had a criminal history category of IV, was convicted of a federal drug offense carrying a

240-month mandatory minimum sentence. Pursuant to his offense level, Freeman's guidelines range was 292 to 365 months' imprisonment. But because he provided substantial assistance, the district court originally departed from that range all the way down to 180 months in prison. *See Freeman*, 586 Fed. Appx. at 237, 239.

Koons, like Freeman, had a criminal history category of IV. Like Freeman, he was convicted of a federal drug offense carrying a 240-month mandatory minimum sentence. And as in Freeman's case, the district court gave Koons a 180-month sentence to account for his substantial assistance.

The only difference between Freeman and Koons is that Koons' guidelines range based solely on his criminal history and offense level (151 to 188 months) was entirely *below* the otherwise applicable mandatory minimum. Thus, whereas the district court in Freeman's case anchored Freeman's sentence to a guidelines range of 292 to 365 months, the district court in Koons' case applied U.S.S.G. § 5G1.1(b) to render the inapplicable mandatory minimum (240 months) the anchor for Koons' downward departure.

Under the Eighth Circuit's construction of Section 3582(c)(2), Freeman is eligible for a sentence reduction, because his initial guidelines range exceeded the inapplicable statutory minimum, but Koons is not. The two are identically situated except for the fact that the Guidelines assigned Freeman's drug crime a higher offense level. Yet because Freeman committed a *more serious* transgression, which carried a higher offense level, he is eligible to benefit from the Sentencing Commission's two-level reduction of offense levels corresponding to drug

quantities. That is, Freeman is eligible to have his 180-month sentence reduced further below the inapplicable statutory minimum. Koons, by contrast, must serve his entire 180 months, even though the mandatory minimum was equally inapplicable in his case—and his crime was not as serious.

This is an outcome that might have made Kafka smirk. But it would subvert the priorities of the Sentencing Reform Act—and, indeed, any rational system of sentencing. *See, e.g.*, *United States v. Wren*, 706 F.3d 861, 864 (7th Cir. 2013) (noting this irrationality and urging the Sentencing Commission to address it, which it did in Amendment 780). If anything, a defendant who is similarly situated to another in all ways except having committed less serious conduct should be eligible to receive a shorter sentence. He certainly should not be forced to serve a longer one. And nothing in Section 3582(c)(2) resigns him to that illogical fate.

2. At the very least, the rule of lenity should preclude the Eighth Circuit's construction of Section 3582(c)(2). That time-honored rule—"perhaps not much less old than [statutory] construction itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)—provides that "if Congress does not fix the punishment for a federal crime clearly and without ambiguity, doubt will be resolved against [the government]." *Bell v. United States*, 349 U.S. 81, 84 (1955); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) (government's proffered interpretation of sentencing statute must be "unambiguously correct"); *Bifulco v. United States*, 447 U.S. 381, 400 & n.17 (1980) (same); *Busic v. United States*, 446 U.S. 398, 406-07 (1980) (same); *Simpson v. United States*, 435 U.S. 6, 15-16 (1978)

(same). Section 3582(c)(2) does not clearly and unambiguously forbid sentencing reductions in this context.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

James Whalen
FEDERAL PUBLIC DEFENDER
Joseph Herrold
ASSISTANT FEDERAL PUBLIC DEFENDER
Capital Square
Suite 340
400 Locust Street
Des Moines, IA 50309

Jeffrey L. Fisher
Counsel of Record
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

January 22, 2018